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No. 07-292

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In The

Supreme Court of the United States

FATIMA G. WELIVER,

Petitioner,

v.

BOARD OF APPEALS, DEPARTMENT OF LABOR, LICENSING AND REGULATION OF MARYLAND and U.S. SOCIAL SECURITY ADMINISTRATION,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Special Appeals Of Maryland

PETITION FOR REHEARING DENYING PETITION FOR WRIT OF CERTIORARI

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PETITION FOR REHEARING DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner Fatima G. Weliver hereby petitions for rehearing of the Court's order denying her petition for writ of certiorari on October 15, 2007.

GROUNDS FOR PETITION

The grounds for this petition are that the Court of Special Appeals of Maryland ("CSA"), when reviewing the factual findings of the Board of Appeals of the Maryland Department of Labor, Licensing and Regulation ("Board of Appeals") under the substantial evidence standard of review, engaged in *de novo* evaluation of the evidence of record.

The CSA thus sought to provide an analysis of and resolve conflicts in the evidence of record inasmuch as the Board of Appeals had not provided an analysis and evaluated the conflicting evidence, nor referred to any evidence of record to support its findings of fact. Such procedure is wholly at variance and has been proscribed by prior decisions of the Court. This petition is to request the Court to vacate the CSA's judgment and remand this case back to the CSA for further proceedings in conformity with the Court's decisions.

DISCUSSION

With reference to the evidence of record, the Board merely stated in toto: "The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearing [hearings by the hearing examiner and the Board]. The Board has considered all of the documentary evidence introduced in this case, as well as the Department of Labor, Licensing and Regulation's documents in the appeal file" and that it "finds the testimony of the employer's witnesses and the claimant's witness, Rebecca Gartelman to be more credible than the claimant's testimony." (App. 39)

When issuing its findings of fact the Board thus had not discussed and evaluated the evidence of record: documentary and/or conflicting testimony *Id.*[1] *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-443 (1965) (The Board must "disclose the basis of its order.") Consequently, the Board of Appeals has presented no evidentiary basis for its findings of fact other than to repeat the charges made by SSA in removing Petitioner from her employment. (E. 176)

When reviewing the Board's decision, the CSA began by "deciding whether there is substantial

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[1] This is aside from the Board failing to make demeanor based assessments of credibility of SSA's witnesses and Rebecca Gartelman when not holding a *de novo* hearing, instead premising credibility of these witnesses on transcript testimony before the hearing examiner. *Cf. Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985).

evidence in the agency record to support the factual findings that Weliver challenges." (App. 9) Upon the Board's failure to evaluate the evidence of record on which to base its factual findings, the CSA continued by performing that function in place of the Board. To the contrary, the Court's precedents clearly hold that a reviewing court's function is to determine whether the *evidence upon which the agency bases its findings of fact constitutes substantial evidence*, rather than evaluating the evidence *de novo* to support the agency's findings of fact. A reviewing court is not the trier of fact.

Referring to the seminal case of *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), holding that the trier of fact must evaluate the evidence of record and that the reviewing court may not substitute its own evaluation of the evidence *de novo*, the Court stated in *NLRB v. Walton Manufacturing Co. et al.* 369 U.S. 404, 405 (1962) that

> We [in *Univeral Camera Corp.*] said that while the "reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view," it may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" *Id.*, at 488.

Discussion below parallels the opinion of the CSA as it evaluates the evidence of record relating to the Board of Appeals' findings of fact.

A. Violation of Management Directive

With regard to Petitioner violating a management directive proscribing calling co-workers after work hours, the CSA evaluates evidence of record including the "SSA Management Labor Relations Handbook." (App. 11) The Board did not refer to and evaluate this document. (App. 39-40) But even as the CSA evaluates the Handbook, it disregards the Handbook's provision that disciplinary authority of the employer agency is permitted respecting employee conduct only "*at the worksite.*" (Emphasis added.) (App. 11)

B. Refusal to Meet with Donna Jones on March 4, 2004 and Vulgar Conduct During the Meeting

Respecting the Donna Jones charge that Petitioner refused to meet with her on March 4, 2004 and exhibited vulgar conduct (App. 14), the CSA stated that the "Board found as a fact that this incident occurred." The CSA further observed that "Jones's testimony during the hearing before Examiner Steinwedel confirmed this account of the meeting." *Id.*

First, the Board of Appeals did not discuss Jones's testimony to establish the "fact that this incident occurred." (App. 40) Secondly, the CSA

accepts the Board's asserted reliance on credibility of Jones's testimony notwithstanding that the Board did not observe Jones's testimony to make a demeanor based assessment of her credibility and two other witnesses. Contrarily, the CSA, in an extensive note (App. 15, note 9), recognized that "In the case at bar, two hearings were held: one before Examiner Steinwedel and one before the Board. Because the Board held a continued, rather than a *de novo* hearing, it could only review the transcript of the testimony of the three witnesses presented at the first hearing – Jones, Faulkner-Martin, and Gartelman," and thus could not make a demeanor based assessment of their credibility.

C. Interruption of Training Exercise Graduation Speaker

The CSA engaged in extensive discussion when evaluating evidence of record *de novo* regarding interruption of training exercise graduation speaker – to provide that which the Board failed to do. (App. 16) In juxtaposition, in the absence of the Board's analysis or reference to evidence of record, the CSA correctly noted the Board's only statement respecting this matter: "On March 5, 2004, the claimant, while attending a graduation ceremony for herself and some of her co-workers interrupted the speaker and walked out before the ceremony was concluded." (App. 17, 40) (This finding of the Board, moreover, does not address SSA's charge respecting interruption of the graduation speaker as a basis for removal.

"Such behavior wr not only disrespectful, it was disruptive." (E. 177))

D. Threat to Donna Jones

The CSA states that the "Board found as fact" that Petitioner uttered the words to Jones "I am going to kill you." (App. 19, 40) The Board's finding is based on nothing, devoid of any reference to evidence of record and, as such, containing no evaluation of conflicting evidence as engaged in by the CSA. The CSA sought to fill the void and underpin such finding of fact by reference to Jones's testimony, confirmed by Faulkner-Martin, before the hearing examiner (App. 19) – even as the CSA had determined that Jones and Faulkner-Martin had not testified before the Board for it to make a demeanor based assessment of their credibility. *Id.*

E. Assaults on Rebecca Gartelman

The CSA sets out the Board of Appeal's findings of fact of assaults on Rebecca Gartelman that the Board attributes to Petitioner. (App. 20) The Board, however, did not refer to any evidence nor engage in an evaluation of evidence of record to support these findings. (App. 40-41)

The CSA thereupon discusses the testimony of Gartelman, Jones and Faulkner-Martin before the hearing examiner in that the testimony of Gartelman is corroborated by Jones and Faulkner-Martin. (App.

23) The CSA contrasts Petitioner's conflicting testimony before the Board to again fill the evidentiary void of the Board. (App. 21) As discussed, *supra*, these witnesses had not testified before the Board, and a demeanor based credibility assessment of their testimony could not be made by the Board.

Petitioner testified before the Board that "if the assault in the bathroom had taken place as Gartelman described it – with the bathroom door open – workers in nearby offices would have heard the commotion," and she "claimed to have had a cordial relationship with Gartelman, so much so that Gartelman even left a note on one occasion asking her to call her at home with regard to comments Faulkner-Martin had made behind Weliver's back." (App. 21-22)

The CSA also notes (App. 22, note 11) that "The Board denied Weliver's request to introduce into evidence a report by a private investigator describing the foot traffic in the area of the bathroom at the time of the alleged assault." And, too, the CSA notes (App. 22, note 12) that "Weliver's counsel obtained a handwriting expert to analyze Gartelman's handwritten note against known samples of her handwriting. The expert concluded that Gartelman wrote the note to Weliver. * * * Gartelman denied writing the note at the first hearing."

Inasmuch as the Board did not evaluate the evidence of record, the CSA on a *de novo* basis improperly concluded that "In considering the evidence

as a whole, the Board could reasonably infer that Gartelman was telling the truth." (App. 23)

F. Reason for Recission of Initial Proposal for Removal

Without reference to evidence of record, the Board of Appeals finding is that "After learning of [Petitioner's] actions towards Ms. Gartelman, that proposal was withdrawn and a new proposal was issued on April 2, 2004." (App. 41-42)

The CSA states that no support was found in the record for Petitioner's contention "that Faulkner-Martin and Jones coerced Gartelman into making false statements against her in order to bolster the Proposal to Remove," respecting the reason for rescission of the initial proposal for removal (dated March 24, 2004) and replacement by the second proposal for removal (dated April 2, 2004). (App. 24)

The April 2, 2004 proposal to remove was issued after Petitioner's counsel, during the morning of April 1, 2004, conducted a telephone interview with Gartelman when she revealed orchestrated harassment of Petitioner by Faulkner-Martin, manager of Petitioner's Social Security Office (E. 208): security guard, not an office employee, was instructed to monitor and harass Petitioner, and the entire office staff was engaged in harassing Petitioner – doing Faulkner-Martin's bidding so not to suffer retribution, as Petitioner testified regarding her telephone call with Susie. (E. 42-43)

As Gartelman's shift in the Social Security building began 3:30 p.m. (E. 307), she then had opportunity to discuss counsel's interview with Faulkner-Martin and Jones that same day. The next day, April 2, 2004, the second proposal to remove followed. Inasmuch as the security guard was under Faulkner-Martin's control, it is reasonable to infer that upon learning of counsel's interview with Gartelman disclosing to him Faulkner-Martin's harassment of Petitioner, Gartelman, a cleaning maintenance worker, was also subject to her control in signing the backdated March 30, 2004 statement (Appellee Append. 118, E. 216); and the statement dated April 1, 2004 containing the toilet bowl allegations *and* a false recounting of counsel's telephone interview with her. (Appellee Append. 117, E. 217)

The men's restroom where the alleged toilet bowl assault occurred with the door open, on March 29, 2004, is located off the public lobby of the building where the employees and others exit the building. When questioning personnel of offices off the lobby who worked there at the time of the alleged incident, and from his own later observations, the private investigator ascertained that employees commonly leave the building at 5:30 p.m. and that "The foot traffic was in fact heavy around the men's room in the lobby from people in the building departing their jobs." (E. 193)

Petitioner testified that on March 29, 2004, her last day at work and the day of the alleged toilet bowl assault, Jones left the office together with her and

Pilar and LuAnne, other employees, and that was at 5:30 p.m. at the end of the work day. (E. 56) Jones could well have recalled three days later, April 1, 2004, that upon exiting the building lobby Gartelman was cleaning the men's restroom off the lobby at that time.

In her statement dated *March 30, 2004* (Appellee App. 218, E. 216), Gartelman claims assaults by Petitioner as having *occurred on March 16, 2004* (14 days earlier) and that to "make matters worse, *she has called my home endlessly every night since March 16 starting at 6:30 p.m.* She calls at least once every half hour and does not stop until 11:00 p.m. I am very afraid of her."[2] (Emphasis added.) That such statement is false, and the alleged assaults on March 16, 2004, is revealed by Gartelman's very friendly note about Faulkner-Martin's tirade regarding Petitioner and her lawyer, *given to Petitioner on March 24, 2004* (8 days later) – *and containing her telephone number.* (E. 215)

Absent coercion, Gartelman's false statements are inexplicable: as to counsel's telephone interview of

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[2] This is the same pattern of false allegations of incessant evening telephoning to Bobby Keaton attributed to Petitioner. (E. 327) Keaton was part of the harassing cabal under Faulkner-Martin's control.

> And he told me that I was finished, that I said what do you mean? *We don't want you. You're not part of this.* So he was in control of Ms. Martin to put me down." [Emphasis added.] [E. 43]

April 1, 2004; false statements of assaults on March 16, 2004 and Petitioner's incessant telephoning; and, clearly false statements of the toilet bowl incident on March 29, 2004, discerned both from the investigative report and as observed from Gartelman's own testimony. That Gartelman has weak character to succumb to such coercion by Faulkner-Martin has been demonstrated by her perjurious testimony before the hearing examiner: her nursing education and employment background in addition to the restroom assault charge against Petitioner (as found by the private investigator); and denial that she wrote the March 24, 2004 note to Petitioner. Further, she is a convicted felon with an extensive criminal record.

The Board's finding that the second proposal to remove was issued by Jones "[a]fter learning of the claimant's actions towards Ms. Gartelman" (App. 41) has no basis in the evidence of record.

INTERVENTION WHEN A REVIEWING COURT ENGAGES IN DE NOVO EVIDENTIARY REVIEW

With comparability to the Court of Special Appeals of Maryland, the Court in *Universal Camera Corp., supra*, at 490-491, stated with regard to a case where the substantial evidence standard of review applies, that it would intervene in the rare instance when the standard appears to have been grossly misapplied:

> Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. *This Court will intervene* only in what ought to be the *rare instance when the standard appears to have been misapprehended or grossly misapplied.* [Emphasis added.]

This is one of the rare cases where the substantial evidence standard of review has been grossly misapplied by the reviewing court.

CONCLUSION

When reviewing the findings of fact set out by the DLLR Board of Appeals where the Board neither evaluated nor even referred to evidence of record to support its findings, the CSA engaged in a *de novo* evaluation of the evidence of record to hold with respect to each Board finding that the finding was supported by substantial evidence. The CSA thus assumed the role of trier of fact in this case – contrary to the Court's proscription in *Universal Camera Corp., supra*, at 488.

Petitioner respectfully submits that this case is appropriate for review by the Court, and that her petition for rehearing of the Court's denial of the petition for writ of certiorari should be granted so

that the CSA's judgment may be vacated and the case remanded to the CSA for further proceedings in conformity with the Court's prior decisions. *Universal Camera Corp., supra*, at 497.

Respectfully submitted,

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CERTIFICATE

I hereby certify that the foregoing petition for rehearing denying petition for writ of certiorari is restricted to the grounds specified in Supreme Court Rule 44, para. 2, and is presented in good faith and not for delay.

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